IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 19, 2014 Session

THERESA MALONE v. TENNESSEE DEPARTMENT OF SAFETY, ET AL.

Appeal from the Chancery Court for Davidson County
No. 12-1131-IV Russell T. Perkins, Chancellor

No. M2014-00190-COA-R3-CV – Filed March 30, 2015

This appeal arises out of an administrative proceeding initiated by a former driver's license examiner. After the examiner was injured on the job, she was absent from work for nearly thirteen months. For some of those months, she was on various forms of approved leave. Eventually, the examiner was terminated for job abandonment. She exhausted the Department of Safety's grievance process, and both the Commissioner of the Department and the Tennessee Civil Service Commission affirmed her termination. The examiner then appealed to the chancery court, which also affirmed the Commission's decision. The examiner appealed. Because we find the Commission's decision was not supported by substantial and material evidence and was arbitrary or capricious, we reverse and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Grace E. Daniell, Chattanooga, Tennessee, for the appellant, Theresa Malone.

Robert E. Cooper, Jr., Attorney General and Reporter; Joe Whalen, Acting Solicitor General; and Eugenie B. Whitesell, Nashville, Tennessee, for the appellees, Tennessee Department of Safety and Tennessee Civil Service Commission.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant Theresa Malone was hired by the Tennessee Department of Safety as a driver's license examiner in August 1999. On October 20, 2009, Ms. Malone was injured in a car accident while administering a road test. From October 20, 2009, to April 5, 2010, Ms. Malone was absent from work on sick leave, annual leave, family medical leave, or workers' compensation leave. Aside from several days in mid-April 2010 when she worked light duty, Ms. Malone did not return to work following her injury.

The Department was notified on June 24, 2010, that Ms. Malone had reached "maximum medical improvement," and her workers' compensation loss pay was terminated. On August 6, 2010, the Department sent Ms. Malone a letter, stating in relevant part:

> You have used all of your leave and are currently in a Leave Without Pay status.
>
> You have used your entitlement of 12 week FMLA leave, November 16, 2009 thru [sic] February 17, 2010. This would make you ineligible for FMLA leave again until November 16, 2010, depending on meeting the qualifications.
>
> If at this time if [sic] your doctor is not ready to release you to come back to work full duty, you will need to contact Susan Cook, HR MGR, . . . by Friday August 13, 2010, to go over your intentions.

Ms. Malone and Ms. Susan Cook, a Department human resources manager, spoke by telephone on August 13, 2010. Ms. Malone asserts that Ms. Cook instructed her to address a request for extended leave to Director Michael Hogan. Ms. Malone maintains that she faxed a written request, addressed to Director Hogan, for an extension of her leave on August 16, 2010. The fax stated in relevant part: "I, Theresa Malone, am writing to request an extension of my leave, please." The Department claims it never received this fax, but the record contains a transmission verification report indicating that it was sent to the Department on August 16, 2010.

On September 20, 2010, Ms. Cook sent Ms. Malone a second letter, which stated in relevant part:

> This letter is to inquire about your intentions for continued employment as a Driver License Examiner. . . . You have not applied for extended leave as we discussed and are still in a without pay status.

> Please contact Director Kerri Balthrop in writing by October 1, 2010, with your intentions about your continued employment.

The letter also included Director Balthrop's fax number and mailing address.

On September 29, 2010, Ms. Malone sent a second fax to the number provided in Ms. Cook's letter. The fax included a note, "This is a copy of my fax that I faxed to you," and the transmission verification report demonstrating that a fax had been sent to the Department on August 16, 2010. The attached letter was identical to Ms. Malone's August letter requesting extended leave. The Department admits receiving the second fax. However, the parties disagree about whether Ms. Cook contacted Ms. Malone after the Department received her second fax.

On November 9, 2010, Ms. Malone was notified by a letter from the Department that she had been terminated from her employment for "job abandonment." The termination letter stated, "As of this date, there has been no written or verbal contact as requested. You have made no attempt to update the Department of Safety of your status."

Ms. Malone timely appealed the Department's decision through the grievance process. The Commissioner of the Department affirmed Ms. Malone's termination on December 1, 2010. Ms. Malone appealed the Commissioner's decision to the Tennessee Civil Service Commission.

An administrative law judge conducted a Level V Grievance hearing on July 21, 2011. Three witnesses testified at the hearing: Ms. Sandra Lorenzo, a Department human resources employee; Ms. Cook; and Ms. Malone. Ms. Lorenzo testified that she was aware that Ms. Malone spoke with Ms. Cook sometime in August 2010, but she did not know of any particular request for extended leave.

Ms. Cook testified that she spoke with Ms. Malone by telephone on August 13, 2010, regarding her position with the Department. In an e-mail summarizing their conversation, Ms. Cook wrote, "[t]his is concerning Theresa Malone, just talked to her and she's going to send a request for extended leave and will send her doctor's statement from her August 18th appointment." According to Ms. Cook, the Department's policy for requesting extended leave is to "[s]end a request through your chain of command saying you want to request extended leave – and that could be with or without pay. You have to attach a current medical statement." She testified that one of the letters she sent Ms. Malone instructed her to include a doctor's statement with a request for extended leave. In this case, Ms. Cook stated that Ms. Malone should have applied for extended leave "through her immediate supervisor – to her branch supervisor; who would have sent it to the district; then to Director Michael Hogan; and then on to Human Resources Division." However, Ms. Cook could not recall whether she informed Ms. Malone of

this process. Ms. Cook did recall leaving a voice-mail for Ms. Malone on October 12, 2010, with a request for her doctor's name and contact information.

According to Ms. Malone, in their August 13, 2010 conversation, Ms. Cook instructed her to send a letter to Director Hogan. Ms. Malone also asserted that she provided a doctor's statement to the Department via hand delivery to her direct supervisor on August 18, 2010. The doctor's note stated that Ms. Malone could return to work on light duty. Ms. Malone claimed she also gave her direct supervisor a copy of a doctor's neurology report on September 24, 2010, and that she saw her supervisor send the report to HR. Ms. Malone denied receiving a voice-mail from Ms. Cook in October 2012 requesting medical information.

Following the grievance hearing, the Commission entered an initial order on April 13, 2012, affirming the Department's decision to terminate Ms. Malone for job abandonment under Tennessee Code Annotated § 8-30-326(c) (2002).[1] The Commission made the following relevant findings of fact:

> 11. An employee applies for extended leave by written request through her employee's chain of command. [Ms. Malone] did not apply for extended leave through her chain of command.
>
> 12. On August 13, 2010, [Ms. Malone] informed Ms. Cook that she would send in a doctor's statement from her August 18, 2010 appointment and a request for extended leave. Although the Department received a doctor's statement from [Ms. Malone's] August 18, 2010 appointment, it did not support a request for extended leave. Instead of providing the Department with a doctor's note supporting her request for extended leave, the doctor's note dated August 18, 2010, stated that [Ms. Malone] could return to work on light duty. However, in August 2010, [Ms. Malone] did not request light duty nor did she request extended leave.
>
> . . . .
>
> 14. On September 20, 2010, the Department sent a letter to [Ms. Malone] giving her until October 1, 2010, to contact Kerri Balthrop, the Director of Human Resources for the Department, in writing regarding her intentions for continued employment. This letter explained that as of September 20, 2010, [Ms. Malone] had not applied for extended leave and that she was still in a leave without pay status. [Ms. Malone] did not respond to the

[1] Tennessee Code Annotated § 8-30-326 was repealed effective October 1, 2012 by 2012 Tenn. Pub. Acts 959 (ch. 800 § 41). The repeal has no effect on this case.

> Department's letter dated September 20, 2010. Specifically, [Ms. Malone] did not contact Director Kerri Balthrop in writing as instructed.
>
> 15. On October 11, 2010, Director Hogan of the Driver License Division requested an update on [Ms. Malone's] status. Ms. Cook informed Director Hogan that in August 2010, the Department had received a fax requesting extended leave[2], but no medical information was attached. On October 12, 2010, Ms. Cook left [Ms. Malone] a message requesting updated medical information.
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> 16. [Ms. Malone] knew that any request for leave must have a doctor's statement attached. [Ms. Malone] failed to follow the Department's procedures for requesting extended leave.
>
> . . . .
>
> 22. The Department terminated [Ms. Malone] for job abandonment after [Ms. Malone] did not return to work after her approved sick leave, FMLA leave and Worker's Comp leave had been exhausted, and after [Ms. Malone] failed to request extended leave in writing with appropriate medical documentation as instructed by the Department. While there is no guarantee that a request for extended leave will be granted, an employee must at least request such leave before it will be granted. (A.R. I 82-84).

The order became final on April 30, 2012. Ms. Malone filed a petition for reconsideration on May 2, 2012, but that petition was denied on May 22, 2012.

On August 2, 2012, Ms. Malone filed a petition for review in the Davidson County Chancery Court. The court entered a memorandum and order on December 20, 2013, affirming the Commission's decision. The court adopted all of the Commission's findings of fact, except for paragraphs 12, 16, and 22.

The court declined to adopt the Commission's finding that Ms. Malone did not request extended leave in August 2010. The court noted that Ms. Malone faxed a written request for extended leave to the Department on August 16, 2010, which the Department acknowledges it ultimately received. The court also concluded that "the record does not support a finding that Ms. Malone knew that any request for leave must have a doctor's note attached . . . ." Finally, the court declined to adopt the Commission's finding that Ms. Malone did not submit a request for extended leave "as instructed by the

[2] Despite this finding by the Commission, the record indicates that the Department consistently stated it did not receive Ms. Malone's August 16, 2010 fax.

Department" because Ms. Malone did not know of the Department's policy on medical documentation.

Despite its conclusions regarding three of the Commission's factual findings, the chancery court affirmed the Commission's decision to uphold Ms. Malone's termination. Specifically, the court found that there was substantial and material evidence that "Ms. Malone failed to report for duty or to her immediate supervisor within two work days after the expiration of any authorized leave of absence." The court also found "no merit" in Ms. Malone's argument that there were existing circumstances causing her absence from work under Tennessee Code Annotated § 8-30-326. Finally, the court concluded the Commission did not violate Ms. Malone's due process rights and properly utilized the grievance procedure. Ms. Malone timely appealed the chancery court's decision.

II. ANALYSIS

Ms. Malone raises several issues on appeal, which we restate as: (1) whether the chancery court erred in finding that there was substantial and material evidence in the record to support the Commission's decision to affirm her termination for job abandonment; (2) whether the chancery court erred in failing to find that there were existing circumstances causing her absence or preventing her return to work; (3) whether the Department failed to provide statutory notice of her right to a due process hearing; (4) whether the Department failed to provide her with the opportunity for a hearing; and (5) whether the Department failed to properly utilize the grievance procedure.

A. STANDARD OF REVIEW

"Courts defer to the decisions of administrative agencies when they are acting within their area of specialized knowledge, experience, and expertise." *Wayne Cnty. v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn. Ct. App. 1988). When reviewing administrative decisions, trial courts and appellate courts use the same standard of review. *See, e.g.*, *Miller v. Civil Serv. Comm'n of Metro. Gov't of Nashville & Davidson Cnty.*, 271 S.W.3d 659, 664 n.3 (Tenn. Ct. App. 2008).

> The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision of the agency if the rights of the petition have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
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> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5)(A) Unsupported by evidence that is both substantial and material in light of the entire record.

(B) In determining the substantiality of the evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h). The standards of review in Tennessee Code Annotated §§ 4-5-322(h)(4) and (5) are "narrower than the standard of review normally applicable to other civil cases." *Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm'n*, 876 S.W.2d 106, 110 (Tenn. Ct. App. 1993). The two standards are "related but are not synonymous." *Id.*

Our review of the agency's decision is limited to the record. Tenn. Code Ann. § 4-5-322(g). We review the agency's findings of fact under the substantial and material evidence standard. *Gluck v. Civil Serv. Comm'n*, 15 S.W.3d 486, 490 (Tenn. Ct. App. 1999). An agency's construction of a statute and the application of a statute to the facts of the case are questions of law, which we review de novo. *Jones v. Bureau of TennCare*, 94 S.W.3d 495, 501 (Tenn. Ct. App. 2002).

B. Substantial and Material Evidence

Tennessee Code Annotated § 4-5-322(h)(5) does not define "substantial and material" evidence, but cautions courts to "take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Tenn. Code Ann. § 4-5-322(h)(5)(B). This standard is not to be mechanically applied. *Mitchell v. Madison Cnty. Sheriff's Dep't*, 325 S.W.3d 603, 618 (Tenn. Ct. App. 2010). Tennessee Code Annotated § 4-5-322(h) requires a "searching and careful inquiry that subjects the agency's decision to close scrutiny." *Sanifill of Tenn., Inc. v. Tenn. Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn. 1995).

In other words, we must determine if the administrative record contains "such relevant evidence as a reasonable mind might accept to support a rational conclusion." *Clay Cnty. Manor, Inc. v. State Dep't of Health & Env't*, 849 S.W.2d 755, 759 (Tenn. 1993) (quoting *S. Ry. Co. v. Bd. of Equalization*, 682 S.W.2d 196, 199 (Tenn. 1984)).

The agency's decision need not be supported by a preponderance of the evidence, but it must be supported by more than a "scintilla or glimmer" of evidence. *Wayne Cnty.*, 756 S.W.2d at 280; *Humana of Tenn. v. Tenn. Health Facilities Comm'n*, 551 S.W.2d 664, 667 (Tenn. 1977).

Ms. Malone was terminated by the Department for job abandonment under former Tennessee Code Annotated § 8-30-326(c). That section provided:

> Any employee who is absent from duty for more than three (3) consecutive work days without giving notice to the appointing authority or appropriate manager to include the reason for such absence, and without securing permission to be on leave, or who fails to report for duty or to the immediate supervisor, or the appointing authority within two (2) work days after the expiration of any authorized leave of absence, is considered as having resigned not in good standing, absent existing circumstances causing the employee's absence or preventing the employee's return. A regular employee who is designated resigned in accordance with these circumstances shall have the right to appeal such action through the grievance procedure and to be reviewed by the commission.

Tenn. Code Ann. § 8-30-326(c). The Department had the burden to prove that Ms. Malone abandoned her job under the statute. *See* Tenn. Comp. R. & Regs. 1360-4-1-.02(7) (2015).

We conclude that the Commission's decision that Ms. Malone abandoned her job under Tennessee Code Annotated § 8-30-326(c) is not supported by evidence that is both substantial and material in light of the entire record. *See* Tenn. Code Ann. § 4-5-322(h)(5)(A). A reasonable mind would not accept the Commission's conclusion based on the evidence in the record. *See Clay Cnty.*, 849 S.W.2d at 759. Specifically, the Commission mischaracterized the evidence regarding the Department's policy for submitting leave requests, Ms. Malone's knowledge of the Department's policies, and Ms. Malone's requests for extended leave. The Commission also failed to consider the Department's references to Ms. Malone as on "leave" and in a "without pay status" and the Department's failure to respond to Ms. Malone's written requests for leave.

Substantial and material evidence does not support the Commission's finding that the Department's procedure for requesting extended leave is "by written request through the employee's chain of command." The record contains several conflicting statements of the Department's policy applicable to Ms. Malone's extended leave request. Ms. Cook could not provide a Department policy or rule governing extended leave requests. Instead, she stated that a request for extended leave "would have needed to have gone through [Ms. Malone's] chain of command. But since she'd been out for so long, I don't know for sure if we could have gotten a copy of it, as well, and then waited for the

approval to come through the chain." Ms. Cook also testified that she could not remember if she told Ms. Malone to submit a written request for extended leave through her chain of command, nor was she sure to whom she told Ms. Malone to send the request. Ms. Malone, on the hand, testified that on August 13, 2010, Ms. Cook instructed her to address her request to Director Hogan, rather than through the chain of command.

None of the Department's letters admitted into evidence directed Ms. Malone to submit a request for extended leave through her chain of command. The August 2010 letter instructed Ms. Malone to contact Ms. Cook "to go over your intentions." The September 2010 letter stated that Ms. Malone had "not applied for extended leave as we discussed," and instructed her to "contact Director Kerri Balthrop in writing by October 1, 2010, with your intentions about your continued employment."

The Commission's finding that Ms. Malone "knew that any request for leave must have a doctor's statement attached" is similarly unsupported by the evidence. Although Ms. Cook testified that one of the letters from the Department directed Ms. Malone to attach a doctor's statement to her request for extended leave, none of the letters in the record provide that instruction. At the July 21, 2011 hearing, Ms. Malone testified that she was unaware of such a requirement:

> Q [Ms. Malone's attorney]: And what did you and Ms. Cook talk about?
>
> A [Ms. Malone]: She told me then that the only thing I had to do was write a letter requesting extension of my leave, and I've got to direct it to Director Hogan – Michael Hogan – and make sure I put it to his attention. And that's all you have to do.
>
> Q: Did she mention that you needed some medical authorization to attach to the letter?
>
> A: No. Because I've got medical stuff galore.
>
> . . . .
>
> Q [Department's attorney]: . . . Did you get a statement stating that you should be placed on extended leave?
>
> A [Ms. Malone]: No. Because I thought while I was being medically treated I was in the guidelines if I was still being medically treated.

The closest the evidence comes to showing any sort of requirement for medical documentation is a voice-mail that Ms. Cook claims she left for Ms. Malone on October 12, 2013. However, even if Ms. Malone had received that message, Ms. Cook testified

that her message only requested Ms. Malone's "doctor's name and fax numbers [sic] so we can receive an update on medical condition."

The Commission's findings that Ms. Malone failed to request extended leave in August; failed to respond to the Department's September 2010 letter; and failed to follow the Department's procedures for requesting extended leave are also contradicted by the evidence. The record indicates that Ms. Malone sent two written requests to the Department for extended leave—one fax in August 2010 and a second fax in September 2010. The August fax stated: "I, Theresa Malone, am writing to request an extension of my leave, please." The Department claims it did not receive the fax in August, but it admits receiving the second fax containing the same text in September 2010. Although the second fax was addressed to Director Michael Hogan, it was faxed to the number given for Director Balthrop in the September 20, 2010 letter. Ms. Malone also testified that she submitted a neurologist's report to her direct supervisor on September 24, 2010.

In addition to mischaracterizing the evidence, the Commission also failed to consider the manner in which the Department described Ms. Malone's employment status in its communications to her and the Department's lack of response to her extended leave requests. The August 2010 letter indicated that Ms. Malone was in a "leave without pay status," and the September 2010 letter indicated that she was in "a without pay status." The letters did not indicate if "leave without pay" and "without pay" were forms of approved leave, nor did they indicate when those classifications would expire. Neither letter indicated that she would be terminated if she did not receive extended leave. Yet, the Department never informed Ms. Malone that it was denying her requests for extended leave prior to termination, even for insufficient documentation or improper submission.

Because we conclude that there is not substantial and material evidence to support the conclusion that Ms. Malone abandoned her job under Tennessee Code Annotated § 8-30-326(c), we reverse the decision of the Commission.

C. Arbitrary or Capricious

We may modify or reverse an administrative decision if it is "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Tenn. Code Ann. § 4-5-322(h)(4). The arbitrary or capricious standard requires a court to determine if the agency made a "clear error in judgment." *Jackson Mobilphone*, 876 S.W.2d at 110-11. A decision is arbitrary if it is "not based on any course of reasoning, or exercise of judgment." *Id.* at 111. The decision may also be arbitrary if it "disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *Id.* at 110-11. A decision that is not supported by evidence that is substantial and material in light of the entire record is necessarily arbitrary or capricious. *Id.* Therefore, because we conclude the

Commission's decision was not supported by substantial and material evidence, the decision must also be deemed arbitrary or capricious. *See Mitchell*, 325 S.W.3d at 621.

D. PROCEDURAL CHALLENGES

Our resolution of the above issues renders it unnecessary for us to address Ms. Malone's procedural challenges, including whether the Department failed to provide her with an opportunity for a due process hearing and statutory notice of her right to a hearing, and whether the Department failed to properly utilize the grievance procedure.

III. CONCLUSION

Because we find the Commission's decision was unsupported by substantial and material evidence and was arbitrary or capricious, we reverse the judgment of the chancery court, vacate the Commission's decision, and remand to the matter to the chancery court with instructions to return the case to the Commission for further action consistent with this opinion.

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W. NEAL McBRAYER, JUDGE